No. ~~1040~~ 46

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

W. B. PARKER, Director of Agriculture, AGRICULTURAL PRORATE ADVISORY COMMISSION, RAISIN PRORATION ZONE No. 1, PROGRAM COMMITTEE, W. B. PARKER, IRA REDFERN, LYMAN LANTZE, JAMES LANGFORD, MARK G. JOHNSON, C. M. BROWN, WM. F. DARSIE, DR. DEAN MCHENRY, PRESTON MCKINNEY, H. C. ANDERSON, A. K. KELLY, RENALD MASTROFINI, ALEX BERG, MESROB MIRIGIAN, MELCHIOR HANSEN, A. L. DAVIDSON, W. J. CECIL and J. C. HABLAN,

*Appellants,*

*vs.*

PORTER L. BROWN,

*Appellee.*

## BRIEF ON BEHALF OF APPELLANTS.

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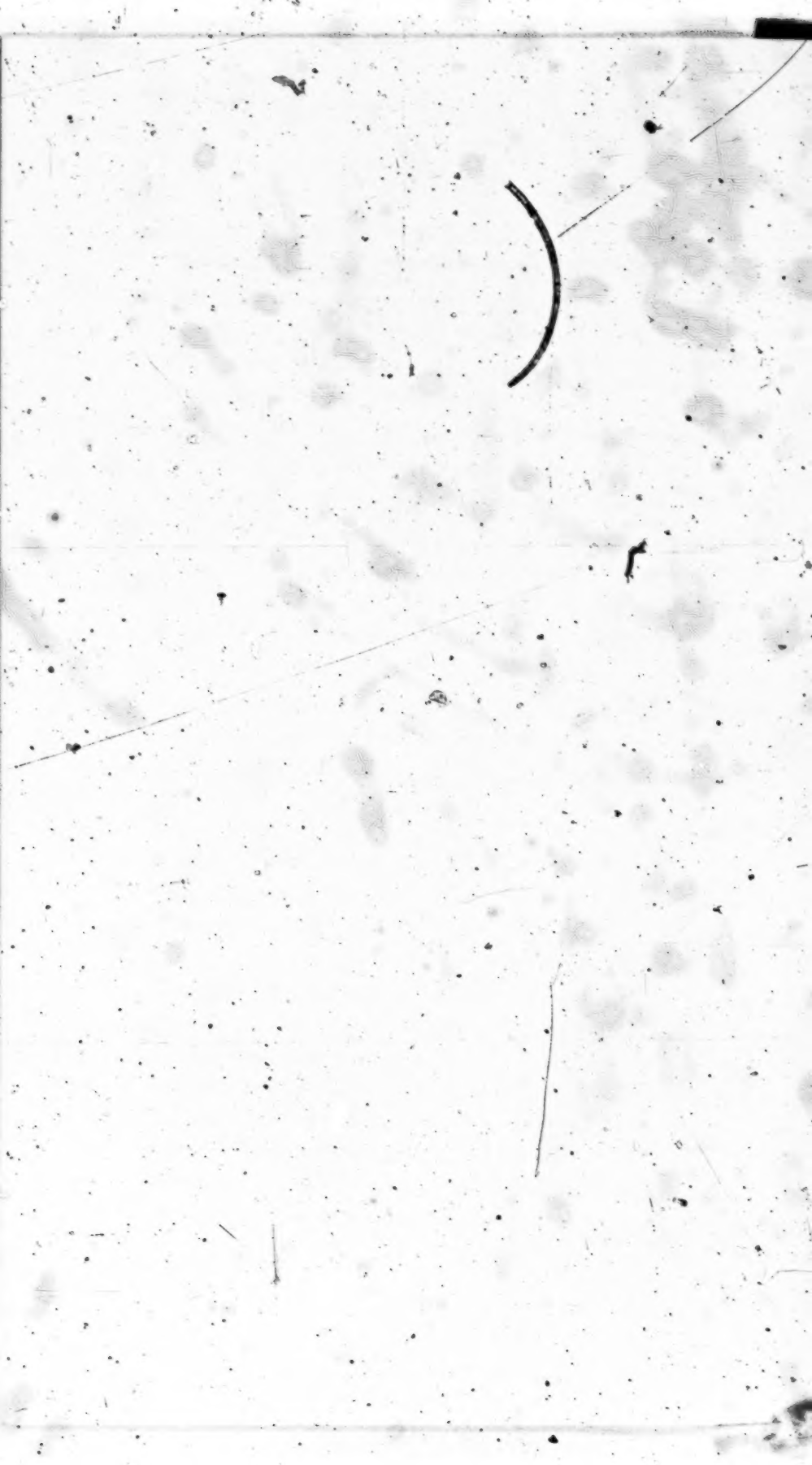

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*Appellants,*

*vs.*

PORTER L. BROWN,

*Appellee.*

## BRIEF ON BEHALF OF APPELLANTS.

## REFERENCE TO REPORT OF OPINION OF LOWER COURT.

The official report of the opinion of the United States District Court for the Southern District of California, Northern Division, the lower court from which the appeal is taken in this proceeding, is found in *Brown v. Parker*, 39 Fed. Supp. 895, and is set forth in full in the Statement as to Jurisdiction herein as Exhibit 2 thereof, pages 39 to 61, inclusive.

## JURISDICTIONAL STATEMENT.

A Statement as to Jurisdiction was filed herein as required setting forth the grounds on which the jurisdiction of this court is invoked, and probable jurisdiction was noted on April 6, 1942.

## STATEMENT OF THE CASE.

This is an appeal from the final decree of the District Court of three-judges (Judicial Code Sections 238(3) and 266; 28 U. S. C. A. 345(3) and 380) which enjoined appellants, the defendants below, officials of the State of California, from enforcing against appellee, "in his capacity as a producer, buyer, packer or handler of wholesome and sound raisins, but not as to unwholesome, unsound or inferior raisins", the Seasonal Marketing Program for Raisins for 1940-1941 adopted pursuant to the provisions of the Agricultural Prorate Act of the State of California "and from in any manner annoying, harassing or molesting plaintiff or persons doing such business with plaintiff", upon the ground that the same "constitutes and is a direct, substantial, and unconstitutional interference with interstate and foreign commerce in wholesome and sound raisins."

### The Statute in Question.

The statute in question is known as the California Agricultural Prorate Act. The original Act became effective June 5, 1933 (Stats. 1933, Ch. 754). It has been amended at subsequent sessions of the Legislature down to and including 1941 (Deering's General Laws 1937, Act 143a,

page 60, 1939 Supplement, page 993, 1941 Supplement, page 1846). The statute itself has been held constitutional (*Agricultural Prorate Com. v. Superior Court*, 5 Cal. (2d) 550; *Whittier Mutual O. & L. Ass'n v. Agricultural Prorate Comm.*, 11 Cal. (2d) 470, 473). and its validity is not here attacked by the appellee. [R. 71.]

**Marketing Program.**

No attack whatever has been made upon the validity of the Marketing Program for Raisins. It is stipulated "that pursuant to the provisions of the Agricultural Prorate Act a proration program for raisins in said zone was instituted August 4, 1937, and continued in effect until it was amended effective July 23, 1940, by the Marketing Program for Raisins, as Amended, as set forth in Exhibit 'A' attached to the Answer to First Amended Complaint herein, which program as thus amended ever since has been and still is in force and effect." [R. 18, para. 12.] This Marketing Program for Raisins, as Amended, issued July 23, 1940, is set forth in full as Exhibit 1 in the "Statement as to Jurisdiction," being pages 7 to 37, inclusive thereof.

The "zone" referred to is designated as "Raisin Proration Zone No. 1" and consists of the counties of San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, Kings and Kern, in the State of California, and within which territory practically all of the raisins in that state are produced.

## 1940-41 Seasonal Marketing Program.

Article III of the "Marketing Program for Raisins, as Amended" (Statement as to Jurisdiction, pp. 14-16) makes provisions for a seasonal marketing program. It is stipulated "that pursuant to the provisions of said program * * * and particularly under the terms of Article III thereof, a Seasonal Marketing Program for Raisins for 1940-41 was duly and regularly adopted and approved effective September 7, 1940, which seasonal program is and has been ever since said date in force and effect in said Zone." [R. 18, par. 12.].

The Marketing Program for Raisins as Amended" defines "standard", "substandard" and "inferior" raisins. (Statement as to Jurisdiction, p. 10.) In the same program (Statement as to Jurisdiction, p. 9) "raisins" are defined to be "unbleached sun-dried or partially sun-dried grapes of the Thompson Seedless, Sultana, and Muscat varieties, grown in the zone."

The essential features of the 1940-41 Seasonal Marketing Program are that 20% by variety of all "standard" raisins of the 1940 crop produced within the zone shall be delivered by the producers into a "surplus" pool on which an advance to producers shall be made at time of delivery of $27.50 per ton for Muscat and Thompson Seedless and $25.00 per ton for Sultanas to be obtained from a non-recourse loan of the Commodity Credit Corporation; that 50% by variety of all such "standard" raisins shall be delivered by the producers into a "stabilization" pool on which a similar advance shall be made of $55.00 per ton for Sultanas from the same source. The balance of such "standard" raisins (30%) may be disposed of by the producers without restriction into a primary channel of trade

as "free tonnage", provided the producer has obtained a secondary certificate therefor to which he is entitled when he has delivered the corresponding percentages into the "surplus" and "stabilization" pools and paid his certificate fee of $2.50 per ton on such 30% free tonnage. No "sub-standard" or "inferior" raisins may be sold or disposed of or offered into any primary channel of trade as "free tonnage" nor delivered into either the "surplus" or "stabilization" pools, but shall be delivered into separate pools for disposal by the program committee for by-product purposes at the best obtainable prices, the net proceeds thereof to be distributed ratably to the producers contributing to the same. [R. 18-19, par. 13.]

## The Raisin Industry.

Raisins constitute one of California's major agricultural industries, being exceeded in volume and value by few other crops. The world production of raisins exceeds that of any other dried fruit with the possible exception of dates. California is the largest producer furnishing about half of the world crop in most years.[1]

Practically all dried fruits produced in the United States come from California. The raisin vine was introduced into California in 1851. In 1879 the crop first exceeded 1,000,000 pounds. In 1885 it amounted to over 9,000,000 pounds. It now averages around 200,000 tons or 400,000,000 pounds. Prices to growers have ranged from as low as ¾¢ per pound to 7¢ per pound. During periods

[1]Raisin Market Information Bulletin No. 274, Federal-State Market News U. S. Dept of Agriculture.

of low returns to the grower it is estimated that in Fresno County alone 20,000 acres of vines have been pulled up.[2]

In 1926 and 1927 the annual production of California raisins reached an average of 278,000 tons and 347,000 acres were planted to raisin grapes. Both the planted acreage and the annual production has since been considerably reduced.

The actual cost of producing raisins naturally varies to a considerable degree and exact figures are difficult to obtain. Generally speaking from 2½¢ to 3¢ per pound or $50.00 to $60.00 per ton is considered a fair average cost for the production of raisins.[3] Over a great part of the last ten years farm prices of raisins have failed to return the cost of production to many growers if items such as interest on investments and charges for producers' own labor are included in the cost.[4]

Between 1930 and 1938 the price to growers ranged from a low of $39.00 per ton in 1932 to a high of $70.00 per ton in 1936. During the same period the packed price per ton received by packers was $66.00 in 1932 and $96.00 in 1936.[5] During the same period the annual carry over of raisins in California on September 1st ranged from 50,000 tons in 1937 to 105,000 tons in 1933.

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[2]State Horticultural Commission Report of California 38th Fruit Growers Convention, p. 92.

[3]Enterprise Efficiency Studies, Agricultural Extension Service, University of California.

[4]An Analysis of Raisin Marketing by Malcolm H. Watson, 1940. University of California, Division of Agricultural Economics, pp. 7-8.

[5]Deciduous Fruit Statistics, S. W. Shear, Giannini Foundation, University of California.

As confined to "raisins" defined in the program and within the territory of "Zone No. 1", there are approximately 240,000 acres devoted to the growing of grapes utilized wholly or in part for the manufacture of raisins, which acreage is held and operated by approximately 10,000 producers, the average individual holding of each producer being about 25 acres. [R. 14, par. 2.]

For the five year period prior to the 1940-41 Seasonal Marketing Program the average annual production of raisins in said zone was approximately 205,600 tons and the distribution thereof in normal trade channels averaged approximately 185,000 tons. [R. 14-15, par. 3.]

The producer of grapes is generally either the owner or the lessee of the land on which the vines are located. He plants, cultivates, irrigates, sprays and tends the vines upon which the grapes are grown and when the fruit matures picks the same. Such grapes may be sold either as fresh fruit or for wine or prepared as raisins. The amount utilized for these different purposes varies considerably from year to year both in the aggregate and with the individual producer. The grower picks the bunches of grapes to be utilized for raisins and spreads them on trays laid between the rows of vines, turns the trays from time to time and finally dumps the dried grapes into sweat boxes or picking boxes. He grades the dried grapes for quality and to eliminate "substandard" and "inferior" raisins, although sometimes this is left to be done by the packer to whom the raisins are sold. When the producer is ready to deliver his raisins he hauls the same in the sweat boxes or picking boxes to the packing plant, or employs independent truckers for that purpose, and in some cases the packer calls and takes delivery in the vineyard. [R. 15, par. 4.]

There are approximately 40 packers of raisins within the State of California, all of whom have packing plants and places of business located within the zone. They make all their purchases and take all their deliveries of raisins from the producers within the State of California. [R. 15, par. 5.] Of these 40 packers, the five largest ones handle approximately 75% of the raisin crop and the ten largest handle around 85%, leaving 15% to be handled by the remaining 30 packers. [R. 119-20.]

The sale of the raisins by the producers to the packers is purely an intrastate transaction and is all consummated within the State of California and within Zone No. 1. Practically all such sales are cash transactions and the sale is completed when the delivery is made, the producer receiving full payment immediately or within ten days. [R. 15, par. 6.]

Before the raisins are delivered by the producers to the packers they have been cured on the premises of the producer but have not been in any other manner prepared for market. They are delivered in the sweat boxes or picking boxes in which the producer dried them and are in clusters attached to the dried stems upon which they matured. [R. 15, par. 7.] When the raisins are received by the packer in such condition they are not the subject of trade or commerce except in the transaction between the producer and the packer as heretofore described and in occasional sales from one packer to another. [R. 119.] They are never sold to the trade or to the consumer for human consumption in that form. [R. 121, lines 4-8.] They are not fit for commercial use until they have been stemmed and cleaned. [R. 120, lines 35-6.]

The grapes mature and are generally dried and ready for delivery beginning sometime between September 15th and 30th. Producers sell practically all of their crop to the packers within ninety days after this time. Few, if any, producers are financially able to carry their own raisins and they are forced to sell and deliver them during this ninety-day period in order to procure money with which to finance their agricultural operations and to take care of the succeeding crop. [R. 17, par. 11.]

The packer, on the other hand, maintains a stock of raisins on hand at all times throughout the entire year in order to supply the trade. As the raisins come in from the producers during this ninety-day period the packer processes or prepares for market that portion for which he has an immediate demand and stores the remainder for later preparation and delivery throughout the balance of the year or the succeeding year. [R. Cross-ex. 131-33.] The raisins are stored by the packers in the sweat boxes or picking boxes in which they are received from the producers and are held in such containers by the packers for periods varying from a few days up to two years. The bulk of the raisins carried over for longer periods of time is carried by the larger packers handling the 85% of the total crop, while some of the smaller packers do not carry over any inventory from season to season. [R. 16, par. 8.]

The packer from time to time, as his trade demand warrants, takes the raisins from the containers in which they were received and have been stored and prepares the same for commercial sale and distribution to the public by cleaning, stemming, cap-stemming, seeding the Muscats, grading, fumigating, sorting, treating with heat and oil in some

instances, and packaging in the various size containers. [R. 16, par. 8; R. 104-6, 113-14; Defts. Ex. "A", R. 103 and 109.]

When the raisins have been so prepared for commercial sale and delivery the packer delivers them to jobbers, wholesalers, brokers, distributors and dealers, who in turn resell and distribute them to the consuming public. [R. 16, par. 9.] This sale and delivery from the packer to the jobber or wholesaler, while not wholly intrastate as in the case of the sale and delivery from the producer to the packer, is to a large extent *intra*state as witness the dealings by the appellee, Brown, whose contracts for sale and delivery as a packer to the various jobbers and wholesalers are *entirely intra*state. [Plaintiff's Exhibits 1, 3, 4, 8 and 9; R. 72, 73, 74, 75 and 76.] Such raisins are ultimately consumed both within and without the State of California but 90% to 95% of the raisins utilized for human consumption as raisins are ultimately consumed outside of the State of California. [R. 16, par. 9.]

From the time of the delivery of the raisins by the producer to the packer the preparation, care, handling, selling and distribution of the same is carried on by the packer and subsequent handlers wholly independent of the producer and entirely free from any control or direction by him. The raisins of the various producers delivered to any packer are commingled and no producer has any knowledge of the subsequent movement or ultimate use or consumption of the particular raisins produced and delivered by him after the sale and delivery of the same to the packer. The producr has no knowldge nor means of knowledge as to whether his raisins move in *intra*state or *inter*state commerce. [R. 16-17, par. 10.]

When the current crop of raisins comes on in September of each year the packers have on hand a substantial carry-over of raisins from the crops of the preceding one or two years, which they endeavor to dispose of before selling the current crop. The bulk of this carry-over is, of course, principally held by the larger packers who handle the 85% of the entire crop. [R. 16, par. 8.]

During the past several years the producers of raisins in California have supplied a large surplus over and above the normal market demand and consequently there has been an excessive carry-over of raisins from year to year from the previous crops. [R. 17, lines 24-8.] This annual surplus served to still further accentuate the seasonal gluts that brought about the disastrous conditions which the Legislature and the industry sought to remedy and alleviate by the raisin proration program.

As of September 1, 1940, just prior to the putting into effect of the 1940-41 Seasonal Marketing Program there was a carry-over of approximately 70,000 tons of raisins of the 1938 and 1939 crops in the possession of packers in the State of California. [R. 17, lines 28-31.]

At all times since the Marketing Program for Raisins under the Agricultural Prorate Act was put into effect in 1937 there have been in the hands of such packers large supplies of raisins in excess of the demand therefor and they have at all times had on hand at least from 30,000 to 40,000 tons of raisins more than they were able to sell and dispose of. The packers have been at all of such times abundantly able to supply all orders and demands for raisins both from within and from without the State of California. [R. 17, lines 31-40.] The problem of the

industry has been a marketing problem and not one of supply. [R. 137, lines 15-32.]

When the original Agricultural Prorate Act was adopted in 1933 no provision was made nor authorization given for the establishment of pools, such as stabilization, surplus, etc.

However, in the practical operation of the statute it was found that in the case of the semi-perishable crops which did not pass directly or quickly from the grower to the ultimate consumer, it was necessary to procure some centralized control of the seasonal surplus in order to insure a more regular and even movement of the commodity from the grower into a primary channel of trade.

In the case of semi-perishable crops such as raisins, prunes, etc. the time or regularity of distribution to the ultimate consumer had very little, if any, effect upon the grower. The latter did not produce a finished commodity ready for the ultimate consumer, but only delivered a raw product which had to be processed or otherwise prepared for the retail trade. The packer or processor or manufacturer, as he may be termed, always had on hand an ample supply to take care of the demands of the wholesale trade and the ultimate consumer. The problem confronting the State Government was to afford relief to a grower whose entire season's output matured at one time and who was forced by his urgent need for funds to throw this entire crop upon a surfeited market and accept whatever the packers were willing to pay.

Under the inevitable operation of the law of supply and demand, the packers generally paid the producers only the bare cost of production and in many instances purchased the growers' crops at even less than cost.

The national government has recognized the seriousness of this problem and also the fact that the states alone were financially unable to successfully take care of it.

In 1930 California Grape Control Board, a Federal Farm Board agency, formed the California Raisin Pool and purchased 316,000 tons of raisin grapes, which it left in the vineyards.[6]

In 1934 the Agricultural Adjustment Administration formulated a raisin marketing agreement which was signed by over 80% of the tonnage. The AAA program divided each grower's raisins into 85% "free tonnage" and 15% as the controlled percentage to be diverted to by-products.[7]

Commodity Credit Corporation was created as an agency of the United States in 1933 pursuant to executive order and was incorporated under the laws of Delaware. Its administration was transferred to the Department of Agriculture on July 1, 1939. Its main object and prin-

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[6]Watson, An Analysis of Raisin Marketing Controls, *supra*, pp. 15-16; Grapes, Raisins and Wines, U. S. Tariff Comm. 1939, pp. 152-8.

[7]Watson, An Analysis of Raisin Marketing Controls, *supra*, pp. 15-16; Grapes, Raisins and Wines, U. S. Tariff Comm., 1939, pp. 152-8.

cipal business has been to make loans to producers to finance the carrying and *marketing* of agricultural commodities.[8]

Applications for such loans are made to the Secretary of Agriculture and if approved are then referred by him to Surplus Marketing Administration. If this latter agency recommends the loan a detailed draft of the terms is submitted to the President of Commodity Credit Corporation. Such recommended loan is then considered in turn by the Directors of Commodity Credit Corporation, the Secretary of Agriculture, and the Budget Bureau of the United States. If all of these officials and agencies then approve the same the entire proposal is submitted in writing to the President of the United States. If the latter approves the proposed loan he notifies the Secretary of Agriculture in writing and the loan agreement is then entered into between Commodity Credit Corporation and the applicant.

The State of California, through its Director of Agriculture and other officials, carried on extended negotiations with the Federal Government officials in an endeavor to

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[8]U. S. Government Manual, September, 1941, p. .....: "The Commodity Credit Corporation is essentially a lending institution, making loans principally to producers to finance the carrying and orderly marketing of agricultural commodities. Section 302 of the Agricultural Adjustment Act of 1938 authorizes the Corporation, upon the recommendation of the Secretary of Agriculture with the approval of the President, to make loans on agricultural commodities (including dairy products) and, except as otherwise provided therein, the amount, terms and conditions of such loans shall be fixed by the Secretary of Agriculture, subject to the approval of the Corporation and the President."

work out a means whereby funds could be made available to finance the growers of major agricultural crops in California and insure their continued production. Individual loans were practically impossible and would not insure the *orderly marketing* essential to the Federal Government's object and purpose. As a means of accomplishing this end it was determined that the provisions of the Agricultural Prorate Act could be utilized. The establishment of stabilization and surplus pools provided both a means of security for the loan and for the orderly marketing essential to the Federal purpose.

Under a somewhat similar Seasonal Marketing Program for Raisins for 1938-39 the Commodity Credit Corporation made approximately $9,000,000 available for loans on the 1938 crop through the program. Prior to placing in effect the Seasonal Marketing Program for 1940-41, negotiations were again entered into between the State and Federal officials and after due and careful investigation the Commodity Credit Corporation made available an $8,000,000.00 loan upon the express condition that the program here under consideration be made effective and maintained in operation. [R. 19, par. 14.] This explains the reference in such seasonal marketing program to the advances to be made to producers of raisins placed in the "stabilization" and "surplus" pools from funds to be obtained from the Commodity Credit Corporation.

The 1940 raisin crop produced within the Zone was the lightest in many years, totaling only 157,300 tons. Of this 47,190 tons were "free tonnage" available at all times to be disposed of by the growers to the packers, 78,650 tons were delivered into the "stabilization" pool and 31,460 tons into the "surplus" pool. Of the $8,000,000.00 made

available by the Commodity Credit Corporation, $5,174,423.64 was actually borrowed on the 110,110 tons of raisins in the two pools and distributed to the approximately 7100 individual growers. By August of 1941 every pound of raisins delivered into the two pools had been disposed of at an average price of $60.51 per ton and the entire loan, with interest thereon, fully repaid.

## The Individual Case of Mr. Brown.

Mr. Brown, the appellee, has been connected with the raisin industry as an employee and grower for a number of years. In 1939 for the first time he engaged in business as a packer and since then has been both a producer and packer of raisins.

As a producer of raisins in Zone No. 1 he voluntarily participated in the Seasonal Marketing Program for 1938-39 and applied for and received and accepted primary and secondary certificates for his raisins for such crop year. [R. 20, par. 16.] As a producer he had approximately 200 tons in 1940. [R. 76.] As a packer he claimed to have handled approximately 2,000 tons for the 1939-40 season. [R. 79.] Of the 40 packers in the State, he handled less than 1% of that season's crop and is obviously one of the smaller packers.

It is a common practice among the smaller packers who do not carry-over much, or any, inventory to start dealing in the spring regarding the coming fall crop of raisins. They take orders from jobbers, brokers and wholesalers and then in turn contract with growers for delivery to cover the same. For the purpose of filling these orders some packers will buy short or long according to their opinion as to the trend the market will take. [R. 129.]

In this manner appellee in May of 1940 accepted orders for 762½ tons of raisins for fall delivery at $60.00 per ton, less some small discount. [R. 74; Plaintiff's Exhibits 1, 3, 4, 8 and 9.] 437½ tons were to be of the 1940 crop [Plaintiff's Exhibits 1, 3 and 9] and 325 tons were to be either the 1939 or 1940 crops. [Plaintiff's Exhibits 4 and 8.] As appellee had 200 tons of his own it was necessary for him to acquire 562½ tons more in order to fill these orders. [R. 76.] In addition to his own 1940 crop of 200 tons appellee had on hand when he accepted these orders in May, 1940, about 100 tons of 1939 raisins. [R. 97.] This reduced the amount that he was required to obtain to 462½ tons.

At that time, 1940 crop raisins were available in the field and could be contracted for from the growers for fall delivery at $45.00 a ton. [R. 97.] Appellee made no effort at that time to purchase or contract for any raisins to fill these orders. [R. 98.] There had been no seasonal marketing program in effect for 1939-40 and one of the reasons why appellee made no effort to buy any raisins or contract for any at that time to fill his 1940-41 season. [R. 98, lines 12-13.] He knew that without a program the growers, pressed for money, would be forced to dump their raisins on the market in the fall at a low price. [R. 93-4.]

The 1940 raisin crop was exceptionally early. [R. 86, lines 39-40.] Appellee states that prior to September 7th, the date when the 1940-41 Seasonal Marketing Program went into effect, there was a rush by growers that were unfavorable to the plan to sell their raisins and he thinks that about 20,000 tons were sold prior to that date. [R. 88, lines 20-23; 90, lines 12-15.] But of these 20,000

tons appellee only saw fit to procure from 75 to 80 tons to cover his orders. [R. 91.]

Obviously, there was available probably a hundred times the amount of raisins required by appellee to cover his orders. In fact, appellee admits that he actually did purchase about 700 tons of 1940 crop raisins, nearly double the amount required for his orders, but strangely enough he apparently did not use these to fill any of stch orders and leaves us with no explanation why. [R. 92-3.]

Unquestionably appellee sold 1940 crop raisins short in the spring of that year. Putting the 1940-41 Seasonal Marketing Program in effect kept the growers from dumping their raisins on the market at cut-throat prices and appellee was forced to pay the growers a higher price than he had gambled on.

After the program was announced on August 30th, the price to the grower prior to September 7th, when it became effective, went from $45.00 to $47.00 and $48.00 per ton. Appellee, however, refused to pay this and still offered only $45.00 a ton. Even at that period he still apparently had some hope that the program would not be placed in effect and he would still be able to buy his raisins at a cut price. [R. 89-90.] After the program went into effect this price increased to $55.00 per ton. Of course, after the program became effective on September 7th growers were only permitted to sell as "free tonnage" the 30% of their crop but this amounted to nearly 50,000 tons available to fill appellee's requirement of 462½ tons. One of the real difficulties seems to be that Mr. Brown was a recalcitrant and refused to buy raisins unless the grower would sell his full 100% crop and thus become a party to violating the program with appellee. [R. 96, lines 22-32.]

## SPECIFICATION OF ERROR TO BE URGED.

1. The District Court erred in finding and holding that the 1940-41 seasonal marketing program for raisins constitutes and is a direct, substantial and illegal interference with interstate and foreign commerce.

2. The District Court erred in finding and holding that such program directly burdens and effectively prevents the free flow of interstate commerce.

3. The District Court erred in finding and holding that such program is simply a means of controlling the supply of raisins into interstate trade channels and that its purpose and necessary effect is to place a controlled embargo on the State's raisin production.

4. The District Court erred in finding and holding that any regulation of the amount of raisins which may be produced, harvested or prepared for market in accordance with the demand and in the amounts and at the times that the available market will absorb the same is an actual burden upon and a direct interference with interstate commerce, and not an aid and benefit thereto.

5. The District Court erred in finding and holding that such program is not a regulation of proper preparation of the raisins prior to their being offered to the consumer and is not based upon protection to the industry through exclusion from the market of both unfit and uneconomic raisins.

6. The District Court erred in finding and holding that the cleaning, stemming, fumigating, seeding, etc., is not

part of the production of raisins essential to their use by the consumers.

7. The District Court erred in finding that the plaintiff was not guilty of laches and is not estopped to question the validity of such program.

8. The District Court erred in failing to specify whether the matters found in paragraph I of the Findings were or occurred in connection with interstate or intrastate transactions, and in failing to expressly find that all such matters were solely and wholly intrastate.

9. The District Court erred in overruling defendants' objections to the finding in paragraph VI of the Findings "that 90% to 95% of such raisins produced in said zone are consumed outside the State of California."

10. The District Court erred in finding in paragraph VIII of the Findings that "where the moisture retained in the dried grapes automatically equalizes toward the right proportions, completing the curing of grapes into raisins. Such process is entirely accomplished on the premises where the grapes are grown and when properly done the grapes have been entirely dried and cured and are a wholesome food and sound article of commerce."

11. The District Court erred in finding in paragraph X of the Findings that "in enforcing said program (defendants) have directly and substantially interfered with and obstructed plaintiff's said business and have directly and substantially burdened interstate and foreign commerce.

## SUMMARY OF ARGUMENT.

The 1940-41 Seasonal Market Program for raisins deals only with the raw product before it is processed or prepared for the consuming public.

It applies wholly to a local transaction and does not directly affect the movement of the finished product in interstate commerce.

The fact that 90% to 95% of the finished product utilized for human consumption (probably 75% of the entire raw crop) ultimately moves in interstate commerce does not remove it from local regulation prior to such movement.

The control exercised by the program is antecedent to the beginning of any movement in interstate commerce.

The difficulty sought to be reached requires local treatment. The seasonal surplus in the raw product and consequent distress market is purely local and does not affect the interstate movement or market for the finished product.

Proration or restricted preparation for market of a product intended for and which does move in interstate commerce is not prohibited by the commerce clause.

State proration or regulation of the movement of a commodity to market which is designed as an aid and to augment interstate commerce and does not in fact burden or obstruct such commerce is not invalid.

Findings contrary to the stipulation of facts and evidence were made under the necessity of supporting the majority conclusion.

Plaintiff by his voluntary participation in and acceptance of the benefits under the previous seasonal raisin program is guilty of laches and estoppel to question the validity of the present program.

## ARGUMENT.

Article I, Section 8 of the Federal Constitution in clause 3 thereof provides that:

> "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * *."

The question is here squarely presented whether a state may regulate any of its agricultural crops, the bulk of which in some form ultimately enter interstate commerce, where such regulation seeks in any form to regulate the supply to meet the market demands.

Both the national and state governments have long sought to insure the farmer an adequate price for his crops, at least the cost of production.

May this be achieved by the state without running counter to the Federal Commerce clause?

It is the position of appellants that the state may accomplish this just as long as such regulation attaches prior to any movement in interstate commerce and does not *actually* burden nor obstruct such commerce.

We believe that the state regulation may directly affect the interstate movement so long as such effect is beneficial and not an obstruction nor burden.

However we are not faced with that problem in the present instance. The regulation here controls the movement of a raw product in *intra*state commerce only. There is not the slightest showing that this has any effect upon the subsequent interstate movement of the finished commodity.

Agriculture has long been the object of special legislative treatment. For the past forty years, said Mr. Justice Frankfurter[9]

> "an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. * * *
>
> "At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers."

During the first World War agricultural producers in California, as in other parts of the country, were encouraged to increase their productive efforts to meet the increased war time demands. This was done and the momentum of that productive effort created a problem for which the public is still striving to find a satisfactory solution.

When the war ended, this war time demand vanished in less than one season. From that day to the present, when we are again faced with vastly increasing war time demands, the major crops of California have been compelled to go to market under surplus conditions and as

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[9] *Tigner v. Texas*, 310 U. S. 141, 146, 60 S. Ct. 879, 881, 84 L. ed. 1124.

a consequence have been selling in a buyer's market. These surpluses may be either seasonal or annual in character, or both.

The ruinous effect of surpluses on price levels is well known. Experience has shown that a surplus of 10% will depress prices at least 25% and an excess of 20% will force prices down at least 50%. The reason for this unusual effect is that agricultural crops in the hands of the producers are perishable or semi-perishable and must be disposed of. Maturing in accordance with nature's plan the pressure on the producer to sell a commodity which will not keep is overpowering. Moreover the farmer is under a constant pressure to dispose immediately of his existing crop in order to finance himself for the coming season. It is the accepted fact that this competition between producers each attempting to dispose of all of his crop at approximately the same time on a surfeited market has resulted in chaotic price conditions and has deprived the farmer of a reasonable value for his products.

This is analogous in a greatly aggravated form to the situation prevailing in the bituminous coal industry and so graphically described by the former Mr. Chief Justice Hughes in *Appalachian Coals v. United States*, 288 U. S. 344, 362, 53 S. Ct. 471, 475, 77 L. ed. 825, as follows

> "This unfavorable condition has been aggravated by particular practices. One of these relates to what is called 'distress coal.' The greater part of the demand is for particular sizes of coal such as nut and slack, stove coal, egg coal, and lump coal. Any one size cannot be prepared without making several sizes. According to the finding of the court below, one of the chief problems of the industry is thus involved in the practice of producing different sizes of coal

even though orders are on hand for only one size, and the necessity of marketing all sizes. Usually there are no storage facilities at the mines and the different sizes produced are placed in cars on the producer's tracks, which may become so congested that either production must be stopped or the cars must be moved regardless of demand. This leads to the practice of shipping unsold coal to billing points or on consignment to the producer or his agent in the consuming territory. If the coal is not sold by the time it reaches its destination, and is not unloaded promptly, it becomes subject to demurrage charges which may exceed the amount obtainable for the coal unless it is sold quickly. The court found that this type of 'distress coal' presses on the market at all times, includes all sizes and grades, and the total amount from all causes is of substantial quantity. * * *

"In addition to these factors, the District Court found that organized buying agencies, and large consumers purchasing substantial tonnages, 'constitute unfavorable forces.' 'The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past.' * * *

"And in a graphic summary of the economic situation, the court found that 'numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed, wages to labor have been substantially lessened, and the states in which coal producing companies are located have found it increasingly difficult to collect taxes.'"

The nature of California's agricultural products and the necessity of marketing the bulk of them at a distance from the places where they are grown have developed practices which are quite similar to those described in the foregoing excerpt. The existing surpluses and the nature of the product force shipment while a large proportion of previous shipments remain unsold. Often upon their arrival at destination these too must be held on tracks under penalty of demurrage charges and deterioration of the contents. The mere knowledge that these accumulated surpluses exist beyond question makes a buyers' market and depresses prices to ruinous levels. The first legislative recognition of this situation occurred in 1923 when the cooperative marketing law was revised and a policy of promoting orderly marketing of agricultural crops was initiated in California. As shown by Section 653aa of the Civil Code the legislature then recognized the advantage to the State of the elimination of gluts and famines in agricultural markets and in the achievement of more orderliness in agricultural marketing.

This measure was found inadequate and agriculture in this State did not share in the prosperity from 1926 to 1929. The reason was the inability of cooperative marketing agents to obtain control of the whole of the crops in which they were concerned, principally because the burdens of orderly marketing endeavors were not shared by all, although the benefits were.

Various other measures were enacted during the following years up until 1933. These measures helped but the

great need was for orderly marketing applied to the entire volume of the crop. This was evidenced by the efforts year after year in important crops to formulate controlled marketing programs which had for their purpose the prorating of the market and as an accomplishment the spreading of the surplus burden over all producers on a proportional basis.

Valiant voluntary efforts were made in the great major crops in California. A great degree of help and success was attained in the citrus industry by the California Fruit Growers Exchange, in the walnut industry by the Walnut Growers Exchange, and in the raisin industry by the California Raisin Growers Association, but these voluntary efforts all fell short of the desired result, especially as the burden of greater surpluses increased, because there was always a sufficient minority on the outside who refused to cooperate and share in the burden and who took advantage of the situation to dispose of their entire crop while the great majority strove to protect the industry. Naturally this resulted in a continual turmoil and unrest among all of the producers.[10]

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[10]Bulletin 565 of the University of California College of Agriculture entitled "Economic and Legal Aspects of Compulsory Proration in Agricultural Marketing" after reviewing numerous of these voluntary commodity programs stated at page 24:

> "Each of the foregoing programs encountered the difficulty of obtaining and maintain participation by a large proportion of the growers. Numerous growers who have participated in such program recognized the economic gains to the industry, yet refused to participate again unless all growers participate. This situation has led many to believe that it is desirable to make participation compulsory for all growers if two-thirds or more of the growers are willing to conduct a restriction program."

The spreading of this surplus burden as an essential prerequisite to stabilization was recognized by the United States Supreme Court in *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 563, in the following language:

> "A satisfactory stabilization price for fluid milk requires that the burden of surplus milk be shared equally by all producers and distributors in the milk shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor."

This agricultural problem was not confined to the State of California. It was nationwide. Congress, as well as various State legislatures, were grappling with it. In 1933 the Federal Agricultural Adjustment Act was born (48 Stats. 1931, 199). In the same year the California Legislature enacted the original Agricultural Prorate Act.

In 1935 the same State Legislature made numerous amendments to the Agricultural Prorate Act and at the same time enacted two other agricultural statutes of similar import characterized by the Supreme Court of that State as follows (*Brock v. Superior Court*, 9 Cal. (2d) 291, 293):

> "Three statutes were enacted by our legislature in 1935 for the purpose of regulating agricultural production and marketing. The Agricultural Prorate Act (Stats. 1935, Ch. 471, page 1526; Deering's General Laws, 1935 Supp. Act 143a, page 373) regulates *production* of agricultural products within the State of California. The Agricultural Marketing Agreement Act (Stats. 1935, Ch. 677, page 1856;

Deering's General Laws, 1935 Supp. Act 145, page 471) regulates *marketing* or shipping of agricultural products within the State where there is *no corresponding Federal regulation.* The Agricultural Adjustment Act, now before us, (Stats. 1935, Chs. 307, 416, pages 1032, 1468; Deering's General Laws, 1935 Supp. Act 146, page 480) regulates *marketing* of agricultural products within the State *where there is Federal regulation* of interstate shipment of the products, and the purpose of the Act is to provide a regulation of *intrastate* commerce which will be corresponding regulation of *interstate* commerce in the same commodities."

The Supreme Court of California in 1936[11] in an extended opinion held that neither the Agricultural Prorate Act nor a program thereunder pertaining to lemons was violative of the federal commerce clause. In so ruling, the court recognized that all of the lemon production in the United States is located in California, that approximately 99% of the California lemons shipped in fresh fruit channels moved interstate and that the same were shipped directly out of the state by the grower or his cooperative agency. Later, in 1938,[12] the same court reaffirmed its stand.

The seasonal program for raisins meets all the essential tests applied in measuring the extent to which local regulation may go as against the limitations imposed by the commerce clause.

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[11] *Agricultural Prorate Comm. v. Superior Court,* 5 Cal. (2d) 550, 559-68.

[12] *Whittier Mutual O. & L. Ass'n v. Agricultural Prorate Comm.,* 11 Cal. (2d) 470, 473.

**The Control Exercised Is Antecedent to the Beginning of Any Movement in Interstate Commerce.**

The restrictions of the 1940-41 Seasonal Marketing Program operate wholly and solely upon the movement of raisins from the grower to the packer. Such movement is purely intrastate. It is wholly negotiated, carried out and consummated within the State of California. When they are thus delivered to the packer they are commercially a "raw" product. While the great bulk of such raisins are ultimately destined to move in interstate commerce the packer holds them in that "raw" condition for varying periods up to two years before he proceeds to process or prepare them for the trade and ship them out of the State. This processing or preparation of the "raw" product for the market is carried on by the packer entirely within the State of California and is a "local transaction".

The general rule is well established that until an article actually moves in interstate or foreign commerce it remains within the local or state jurisdiction and is subject to such local or state regulation. This general rule is not altered by reason of the fact that the article involved may be specifically intended for such interstate or foreign commerce and may have been actually manufactured or produced for that specific purpose. (*Coe v. Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 43 S. Ct. 83, 67 L. ed. 237.)

The tenacity with which this doctrine has been adhered to is impressively shown in the instance of electricity generated in Idaho for transmission into Utah The right of Idaho to tax the *generation* of the electricity was upheld even though the simultaneous occurence of the generation

and the transmission made it practically one continuous process. (*Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 52 S. Ct. 548, 76 L. ed. 1038.)

The ginning and compressing of cotton to prepare it for market and for shipment in interstate commerce is certainly analogous to the cleaning, stemming, fumigating, seeding and packaging of raisins for the same purpose. The alleged position of appellee here as a buyer of raisins for delivery in interstate commerce is no stronger than the position of the buyer of such cotton for delivery in interstate commerce. Yet the ginning, compressing and sale of such cotton within the state was held to be a local transaction and the jurisdiction of the state to tax the same as a local activity has been sustained. (*Chassaniol v. City of Greenwood*, 291 U. S. 584, 54 S. Ct. 541, 78 L. ed. 1004; *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 54 S. Ct. 267, 78 L. ed. 622.)

Any exemption in the case of taxing statutes from the restrictions of the interstate commerce clause is dissipated by the series of cases establishing the absolute immunity of interstate commerce from state taxation.[13]

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[13]The state may not tax goods moving in interstate commerce. (*Kelly v. Rhoads*, 188 U. S. 1, 23 S. Ct. 259, 47 L. ed. 359.) It cannot tax interstate transportation. (*Case of the State Freight Tax*, 15 Wall. 232, 21 L. ed. 146), nor may it tax the gross receipts from such transportation. (*Galveston, Harrisbury & San Antonio R. R. Co. v. Texas*, 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031.) It cannot tax the solicitation of a contract for such transportation. (*McCall v. California*, 166 U. S. 104, 10 S. Ct. 881, 34 L. ed. 391.) The state cannot tax the business of carrying on interstate commerce under the guise of a general tax (*Lelour v. Port of Mobile*, 127 U. S. 640, 8 S. Ct. 1380, 32 L. ed. 311), nor may it tax the solicitation of a sale of goods to be brought from another state. (*Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 45 S. Ct. 525, 69 L. ed. 982.)

**Effect of National Labor Relations Board Cases.**

The decisions under the National Labor Relations Act[14] undoubtedly established the authority of Congress under certain circumstances to regulate purely local conditions such as preparation for market, production, etc. This constitutes an exception to, but does not change, the general rule. The Congressional authority is not exercised because such local conditions are a *part* of interstate commerce, but because it is deemed necessary for Congress to step into such purely local field in order to *protect* interstate commerce.

The differentiation in the field of consideration and in the approach in determining whether a purely local transaction is subject to state regulation and in determining the power of Congress to regulate such purely local transactions for the purpose of protecting interstate commerce is most clearly and succinctly set forth in the minority opinion of the lower court. [R. 45-7.]

This court in one of the first of such cases to come before it[15] rejected the theory advanced by the Government that the raw product used in making up an article ultimately moving in interstate commerce became a *part* of the "stream" or "flow" of such commerce from its incipiency, and instead proceeded to make the plenary power

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[14] (From *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893, to *U. S. v. Darby*, 312 U. S. 100, 61 S. Ct. 451, 85 L. ed. ....)

[15] *National Labor Relations Board v. Jones & Laughlin Steel Corp., supra.*

of Congress to take control of such otherwise purely local conditions when necessary to protect interstate commerce an exception to said general rule. This is further evidenced by the fact that this court has in recent cases, subsequent to such National Labor Relations Board cases,[16] cited and relied upon *Coe v. Errol, Heisler v. Thomas Colliery Co., Chassaniol v. City of Greenwood,* and *Federal Compress & Warehouse Co. v. McLean, supra.*

The conclusion is well stated in the minority opinion in the lower court heretofore referred to that

> "While the rigid distinction between production and commerce no longer holds in so far as the exercise of congressional restraint and regulation is concerned, * * * it is still maintained when we come to assay the exercise of state powers."

That these Labor Relations Board cases are not intended to impair the traditional sovereignty of the several states in exercising their historic powers over local matters was clearly indicated by this court very recently in upholding a State Labor Relations Act where it was not incompatible with nor hostile to the policy expressed in the Federal statute.[17]

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[16] *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. ed. 565.

[17] *Allen-Bradley Local No. 1111 etc. v. Wisconsin Employment Relation Board*, 314 U. S. ....., 62 S. Ct. 820, 86 L. ed. .....

## North Dakota Grain Cases.

The majority opinion of the lower court [R. 38-9] stresses the so-called North Dakota Grain Cases. In fact, the minority opinion refers to them as the bottom upon which the majority rests its finding of unconstitutionality of the raisin program. [R. 47.]

In the *Lemke* case[18] the North Dakota Act provided a comprehensive scheme for regulating the *buying* of grain and provided that purchases could only be made by those who held licenses from the State, paid State charges for the same, and acted under a system of grading, inspecting and weighing fully defined in the statute. Furthermore, the grain could only be purchased subject to the power of the State Grain Inspector to determine the margin of profit which the buyer should realize upon his purchase. The "margin of profit" was defined as "the difference between the price paid at the North Dakota Elevator and the market price, with an allowance for freight, at the Minnesota point to which the grain is shipped and sold".

It is not surprising that the majority of the court considered this to be an attempt to *directly* regulate interstate commerce when the Act specifically controlled the buying and the margin of profit and the freight rate from North Dakota to Minnesota. Even so, this was a borderline decision, and Mr. Justice Brandeis rendered a dis-

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[18] *Lemke v. Farmers Grain Co. of Embden*, 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458.

senting opinion with the concurrence of Mr. Justices Holmes and Clark.

In *Grandin Farmers Co-Op. Elevator Co. v. Langer*, 5 Fed. Supp. 425, affirmed without opinion 292 U. S. 605, 54 S. Ct. 772, 78 L. Ed. 1467, the State of North Dakota attempted to go even further and authorized the Governor to declare and maintain an embargo on the shipment out of the State of any agricultural product produced within the State when the market price thereof reached a point where the returns are confiscatory. Here was an attempt to directly regulate nothing but interstate commerce and, in addition, to discriminate against such commerce, as no embargo was laid upon movement or sales within the State. There you have a direct regulation of interstate commerce and discrimination against the same as contrasted in the instant case with a regulation affecting wholly an intrastate condition and having the same application upon the commodity regardless of whether it moves intrastate or interstate.

The minority opinion points out [R. 47] that Mr. Justice McKenna, who wrote the opinion in the *Lempke* case, later wrote the opinion in *Heisler v. Thomas Colliery Co., infra*.

## The Raisin Program Does Not Burden Interstate Commerce.

It is obvious that the program in question does not attempt to directly regulate any interstate commerce movement and has no direct specific reference to such commerce. The determination then of the validity of the program rests upon whether it directly or indirectly affects interstate commerce or is actually a burden thereon or an obstruction thereto. Even if it directly or indirectly affected commerce its validity or invalidity must ultimately be determined by the conclusion, we believe, as to whether such direct or indirect effect constitutes an actual burden or an obstruction to such commerce.

The majority opinion in the lower court said [R. 40]:

> "It may here be stated that the inhibition of the program is not based upon crop limitations or upon the health of the consumer or protection of the industry to exclusion from the market of unfit fruit. Such cases as *Sligh v. Kirkwood*, 237 U. S. 52, 32 S. Ct. 501, 59 L. Ed. 835, are not in point."

The implications drawn from this statement are difficult to reconcile with the legal conclusions reached by the author thereof. Can it be said that a limitation upon the crop itself by restricting the amount of grapes which may be utilized for raisins or the amount of acres which may be planted thereto does not directly or indirectly affect commerce therein nor burden nor obstruct the same, but that a limitation upon the amount of raisins which may be harvested or prepared for market or delivered to a packer for subsequent preparation for market, or regulating the time of such movement would do so?

It is true that the right of the State has long been recognized to exclude from interstate commerce by means of quarantine and standardization laws diseased, unfit and substandard fruits and other commodities, but this has not been done because of any specific exemption from the interstate commerce clause of such diseased or unfit commodity. It is done rather because of decisions passing upon the specific cases and reaching the conclusion that because of such diseased or unfit condition the prohibition and exclusion of the commodity in question did not therefore burden or obstruct interstate commerce.

This is recognized in the Minnesota Rate Cases upon which the majority of the lower court are prone to rely in this instance, where it was said:[19]

> "Quarantine regulations are essential measures of protection which the States are free to adopt when they do not come into conflict with federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the States and has repeatedly acquiesced in the enforcement of State laws. * * * Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health

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[19] *Simpson v. Shepard*, 230 U. S. 352, 406, 33 S. Ct. 729, 57 L. Ed. 1511.

> * * *; but the power of the State to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question."

Here, in the present instance, we have a local condition, a seasonal surplus of "raw" raisins existing only in the State of California. No other state is called upon to deal with this problem. No other state is concerned with the "raw" raisin product nor even interested therein—at least not so long as there is the ample supply of finished raisins shown here to satisfy the legitimate demands of all the rest of the states.

There is no discrimination involved for the program operates equally upon the raisin whether it is ultimately consumed within or without the State of California.

The statement that the "inhibition of the program is not based upon * * * the health of the consumer or protection of the industry through exclusion from the market of unfit fruit" is belied by the terms of the program itself. The latter permits only "standard" raisins to be placed on the market and eliminates all "substandard" and "inferior" raisins except for by-products purposes.

The lower court stresses the fact that the program does not place a "limitation upon submitting ripe grapes to a proper process whereby the grapes become a marketable raisin" and concludes "that the prorate program as presented in this case does not attach to or impinge upon 'production'."

The only implication that can be drawn from this conclusion of the lower court is that with all other factors remaining the same and with the same motive and the same alleged intent to control and regulate the movement of raisins in interstate commerce if the program had controlled the amount of grapes that might have been dried for the purpose of becoming raisins then there would have been no unlawful interference with interstate commerce and the program would have been sustained.

Referring again to the Minnesota Rate Cases at page 402 the court there said:

> "Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidently or indirectly be involved. * * *. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provisions for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

The court then proceeds with numerous illustrations of the exercise of such powers by the state, citing the propriety of local action with respect to pilotage, improvements of harbors, bays and streams, and bridges across navigable rivers, wharves and docks, etc.

In the instant case the program applies only and solely to internal commerce. The State Supreme Court has declared it to be a protective measure of a reasonable character in the interest and essential to the welfare of its people. The dumping of the entire raw product by the growers into the hands of the packers at one time and the consequent threat and injury to the growers because of this seasonal glut in the *local* market is a matter peculiarly of local concern and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs.

Presumably, the finished raisin product moves into the interstate and foreign commerce in accord with the demand therefor. Any Federal regulation of this interstate movement of the finished product would not remedy the condition of the grower nor in any wise reach the *local* situation sought to be alleviated. Nature's method of maturing the raw raisin product at one short period in the year cannot be changed. Federal regulation of the interstate movement of the finished product will not in one whit abate the necessity which the poorly financed growers are under to dump their entire crop on the market immediately upon its maturity.

It is difficult to dismiss the authority of *Sligh v. Kirkwood, supra*, as lightly as the majority of the lower court seemingly seek to do. Florida prohibited the sale or shipment (a direct regulation of commerce) of citrus fruits

"which are immature or otherwise unfit for consumption." The great bulk of Florida's citrus fruits are directly sold and shipped in interstate commerce.

This Florida statute constitutes a far greater onslaught upon the federal commerce clause than does the California raisin program. Both deal with a major crop of the respective states. But Florida has not the monopoly of citrus fruits that California has of raisins and her problem was not nearly so *local* as the raisin grower's. In both instances the great bulk of the crop leaves the state in interstate commerce. But Florida's citrus fruits move interstate directly and immediately while it is only the finished or processed raisin that moves interstate after it is several times removed from the growers' hands and as long as two years after. In both instances a state was endeavoring to protect one of its major crops. In Florida this involved a direct ban upon interstate shipment, in California the program controls only the raw product into the processors' hands within the state.

In the *Sligh* case this court said this did not unlawfully impinge upon the commerce clause. Surely if Florida could directly prevent the interstate movement of immature citrus fruits to protect the reputation of that industry, then California may control the purely *intra*state movement of equally detrimental raisins in order to preserve the life of that industry.

The majority opinion states R. [41-2]:

> "While it is true that the program purports merely to prevent and regulate the sale of raisins to the packer under the universal custom of his cleaning, stemming and packaging them within the State, the

raisins on the producing premises and those stored by the program committee are at all times kept from market except through the operation of the program. It is impossible to avoid the conclusion that the purpose and necessary effect of the program is to place a controlled embargo on the State's raisin production, in order to effect and stabilize prices. It seems clear to us that the program is frankly and simply a means of controlling the supply of raisins into interstate trade channels to meet the market demands. As to this purpose it is not in our province to comment. We think the State has attempted to accomplish this result by a process which impinges upon a grant of power to the Federal Government."

With the above conclusion we are forced to differ. Putting the implication of the Court more bluntly, it amounts to a statement that the program complained of was and is an attempt to control the supply, starve the consumer market and force higher prices for the product at the expense of the consumer. We submit that a careful examination of the history of the industry does not support this position. Neither do the terms of this particular program nor its actual operation warrant any such conclusion. And there is not a single evidenciary fact in the record to support such an inference.

This program is, as its name indicates, a *seasonal* program. It does not seek to affect the price to the consumer nor the distribution movement to the wholesale or retail trade. And in fact it has not done so.

The entire *finished* raisin product, which is the *only* product moving *inter*state, is held wholly in the hands of dealers, who are abundantly able and amply equipped to

distribute the same in accord with both the intrastate and the interstate market demand.

True, there has been for many years an annual carry-over in excess of the consumer demand. In years when this *annual* surplus is exceptionally large it further distresses the grower's problem with his *seasonal* surplus. But a solution of the grower's *seasonal* surplus problem does not in a fraction of a degree obstruct, burden or affect interstate commerce. An oversupply of raisins has been on hand at all times ready and waiting—eagerly—for any and all interstate demand.

The 1940-41 Seasonal Marketing Program deals with a different situation. Every year, in the raisin industry, regardless of the size of the crop, there occurs a "seasonal" or temporary surplus in the raw product. The picking of grapes for raisins begins normally around September 1, of each year. All of these raisin grapes are normally picked, dried, cured and ready for the packer by October 30. The entire production of the grower's annual raisin crop comes within two of the twelve calendar months.

With an average crop of around 200,000 tons produced by approximately 7500 growers, the average grower produces about 25 tons. These 200,000 tons constitute approximately half of the world supply of raisins for twelve months, and are distributed to the trade and to the consumer fairly uniformly over the entire year.

Without some such program, as the one under discussion, the trend of events was obvious. The small grower had his year's work in a crop which matured and was ready for market in September and October. He was not in a financial position to carry it. He had a "raw"

product and *his* market was not interstate, but was limited to some 40 local packers. Of these, from five to ten larger ones handled 85% of the entire raisin crop.

The result was inevitable. The small grower was forced to sell on a distress market to packers financially able to hold the product and dispose of it in accordance with trade requirements. At most the packer had only to purchase sufficient raisins in September and October to meet his current demands. In years when there was a large annual carry-over the packer could wait months before making any purchases. The grower was at the complete mercy of the packer and took whatever the latter saw fit to pay.

And when the packer drove bargain prices for the raw product he did not pass up the extra profit. The amount of raisins in interstate commerce was not thereby changed nor were the prices to the consumer affected.

The basic thing which this program does is to permit the "raw" raisin crop to be held under State supervision with the aid of the Federal government through Commodity Credit Corporation financing for the protection of the grower, instead of leaving the latter at the mercy of the packer.

There is nothing in the entire gamut of the *finished* raisin, from the packer to the jobber to the wholesaler to the retailer to the consumer that indicates a forced dumping by the seller upon a surfeited market. In every step of the way the movement of the supply of *finished* raisins is controlled and regulated to meet the demand throughout the year.

It is only in the case of the "raw" raisin product that the grower is forced by necessity to dump the entire year's supply on the market at one time.

We believe that the majority opinion both in its premise and in its conclusion completely overlooks the fact that the movement sought to be controlled is from the producer to the packer and the price sought to be stabilized is the price paid by the packer to the producer, neither of which relate to interstate commerce but are wholly intrastate transactions.

The "glut" and "famine" which this legislation and program sought to alleviate and prevent were the "glut" and "famine" of raisins in the hands of the producers and not that of raisins in the hands of the packers.

The statement of facts [R. 17, par. 11], states:

> "That a large percentage of the raisins produced within the Zone is sold and delivered to packers within ninety days after the start of the delivery season which ranges from September 15th to September 30th. Generally speaking, the producer of raisins is forced to sell and deliver his raisins during this period as soon as the raisins have been cured in order to procure funds with which to finance his operations and his succeeding crop."

Here, as in most agricultural legislation, it is the producer whom the Government seeks to protect in order to insure an adequate and continuous supply of the essential food commodity in question.

Unlike the situation in certain other commodities, such as oranges, lemons, grapefruit, etc., the condition which the

proration program seeks to correct and protect in th present instance of raisins is one wholly intrastate ac which has no appreciable relation to nor effect upon inte state commerce.

The raisin producer unlike the grower of orange lemons or grapefruit or walnuts, does not himself dispo of a commercially finished product into interstate commerc but delivers only a raw product to a packer or a processo within the State. It is from the California packer an not from any out of state concern that the program seek to protect the grower.

However, if the program be considered as actually means of controlling the supply of raisins into interstat trade channels to meet the market demands, then it di fers not one whit from the object and purpose of th Order Regulating the Handling of Oranges and Grape fruit grown in the States of California and Arizona unde the Federal Agricultural Adjustment Act.

Upon the authority of the Circuit Court of Appeal for the Ninth Circuit (*Edwards v. United States*, 91 Fe (2d) 767, 777) such purpose and object and the attain ment thereof are in fact highly beneficial to interstat commerce. Such regulated flow to market is said to ten to "a more accurate anticipation by railroads of the prob able transportation requirements" and "a more efficien conduct of railroad operations respecting the availability and flow of * * * cars", all of which in turn tends to "increased consumptive demand" thereby making in the long run for a greater movement of interstate commerce.

Likewise considering the premise of the lower court tha the necessary effect of the program is to affect and stabiliz

prices we have the same authority that this is also beneficial to interstate commerce. At pages 779 and 780 of the *Edwards* case it is said:

> "We take notice of the 'constantly recurring burdens on interstate commerce' during the successive economic depressions of the last hundred years, * * * due to the ability of consumers to purchase less than the average of the production of both the agricultural and manufacturing states. * * *
>
> "We accept as a rational concept of fact * * * that, had the producers of agricultural products of the agrarian and fruit growing states continued to receive a fair average price for the prosperous periods preceding these depressions, they would have purchased more of the products of the manufacturing states. * * * This would tend to make larger the volume of interstate commerce, thus eliminating the burdens of depressions on interstate carriers or diminishing their weight or making them less 'constantly recurring' in their 'throttling' of such commerce.
>
> "We must also attribute to congressional motivation the rational concept of fact that, in the historic succession of economic depressions, interstate commerce plays a causative and devastating part in the overcrowding of markets preceding their stagnation. The prevention of the use of interstate commerce in such overcrowding may ameliorate the economic prostration of the whole nation, * * *."

It is a well known economic fact that the difference between 2¢ or 2½¢ or 3¢ or even 3½¢ a pound for the raw product raisins to the grower will have no appreciable effect upon the ultimate price for the finished product paid by the consumer.

The facts in this case show that at the time the program became effective there was a stock of 70,000 tons of the raw raisin product in the hands of the packers and 30% of the new crop was made immediately available. The packers have at all times had on hand a stock of the raw raisin product amounting to not less than 30,000 to 40,000 tons more than the market required, and which they were unable to dispose of.

The lower court brushes this aside upon the ground that the 30% free tonnage might be reduced to 15% or entirely eliminated and says that the vice of the situation is that any marketable part of the crop is required to be submitted to any regulation. It is true that it is within the realm of possibility that the free tonnage might be reduced to 15% or entirely eliminated in the event that the stock on hand in the possession of the packers became so great as to be more than ample to supply all demand. However, as remarked by the court in *Slight v. Kirkwood, supra*, no such case is here presented and whether such a case as supposed would be within the statute is not for us to say.

To remove the implied fear that the state agency may place a complete embargo upon the raisins and thus force an exorbitant price from the consumer in interstate commerce, Section 10 of the Act, itself, provides that in order to place the program in effect it must be found from evidence and data developed at public hearings "that the institution and operation of a proration program will not result in unreasonable profits to producers * * *."

Furthermore as recently stated by this court:[20]

> "Constitutional questions are not to be dealt with abstractly. * * * They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. * * * Nor will we assume in advance that the state will so construe its law as to bring it into conflict with the Federal Constitution or an act of Congress. * * * Hence we confine our discussion to the precise facts of this case and intimate no opinion as to the validity of other types of orders. * * *."

And continuing in the same case as to the same effect the court further remarked that:

> "It is not sufficient, however, to show that the act *might* be so construed and applied as to dilute, impair or defeat those rights."

The precise facts of this case are that interstate commerce has not been interferd with in the slightest degree.

Viewing the situation in its worst possible light through the eyes of the majority opinion of the lower court, the program controls the movement of the raw raisins from the grower to the packer in order to procure a stabilized reasonable return to the grower to insure his economic existence for the benefit of the public welfare of this state.

This controls the movement of a commodity at its source which ultimately in its finished state moves almost entirely in interstate commerce and might possibly result in some control of the interstate commerce movement, although

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[20] *Allen-Bradley Local No. 1111 v. Wisconsin etc. Board, supra.*

the evidence in the instant case shows no effect whatsoever upon any such interstate movement.

The majority of the lower court, referring to the opinion of Mr. Justice McKenna in *Heisler v. Thomas Colliery Co., supra,* state [R. 43]:

> "But, on the other hand, if the State of California has the power to execute a control plan of its entire fruit crop and permit it to enter the market for consumption only as and when if administrators adjudge proper, then every state can so control all industries and crops within its boundaries by the same token. This presents a condition certainly no less repugnant to our dual system of State and Federal Government than that illustrated by Mr. Justice McKenna, a condition in the situation confronting us which the constitutional fathers sought to guard against by writing the commerce clause into the Constitution itself."

Notwithstanding such statement the power of the State to control the entry of its products into market has been repeatedly sustained.

Florida made it "unlawful for anyone to sell, offer for sale, ship or deliver for shipment any citrus fruits which are immature or otherwise unfit for consumption, * * *" And the bulk of Florida's citrus fruits are shipped out of the State. Notwithstanding its direct effect upon interstate commerce this was sustained as a protection of the State's reputation in foreign markets and the consequent beneficial effect upon a great home industry.

Indiana proceeded "to regulate the sale of concentrated commercial feeding stuff in the State," although numerous such sales were made from points without the State.[21]

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[21] *Savage v. Jones,* 225 U. S. 501, 32 S. Ct. 715, 56 L. ed. 1182

The state of Oklahoma in a statute which served as a model for the California Agricultural Prorate Act curtailed the withdrawal of its oil and gas in excess of reasonable market demands. The great bulk of the Oklahoma oil found its way into interstate commerce just as in the case of California raisins. Likewise the motive in both instances was the same—to prorate and control the movement of the commodity from its source in order to protect and stabilize the prices to the producer. Both the minority opinion of the lower court and the Supreme Court of the State of California[22] found the *Champlain* case very determinative of the present question. The majority opinion seeks to differentiate it as a regulation of *production* and a protection of the state's natural resources. However, nowhere has the majority opinion been able to differentiate between *production* and between *preparation for market* or *delivery to* the *processor* within the state *for such preparation* as local transactions antecedent to any movement in interstate commerce, nor is there any authority cited or to be found to the effect that natural resources are exempt from the restriction of the interstate commerce clause.

The majority of the lower court cite the case of *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564, 55 L. ed. 716, apparently in support of the theory that the same rule relative to interstate commerce does not apply to natural resources as to other commodities. The Oklahoma statute absolutely prevented interstate commerce in natural gas but did permit such interstate commerce. It was defended as a conservation of the state's natural resources for the benefit of the inhabitants of the state.

[22] *Agricultural Prorate Comm. v. Superior Court*, 5 Cal. (2d) 550.

As the court remarked (p. 250), "It was manifestly enacted in the confident belief that the state had the power to confine commerce and natural gas between points within the state, * * *." The statute was held unconstitutional upon the grounds that it was a direct and express discrimination against interstate commerce. The court said:

> "The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation." (P. 255.)

The right of a state to prorate or curtail its gas[23] and its oil have been subsequently upheld and the *Champlain* case approved.[24] In this latter case, although admittedly a large proportion of the Texas oil goes into interstate commerce the proration thereof was not even attacked upon that ground.

*Currin v. Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. ed. 441, and *Townsend v. Yeomans, supra*, strikingly illustrate the interrelationship of Federal and State control of commodities, the bulk of which ultimately pass into interstate commerce. A Georgia statute fixed commission, auction fees and weighing and handling fees for tobacco. 100% of the tobacco moves in interstate and foreign commerce. It is all sold at auction and purchasers "for the most part are manufacturers of cigarettes who immediately have the tobacco transferred to their plants outside the state." This is in sharp contrast with the raisin industry

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[23] *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 57 S. Ct. 364, 81 L. ed. 510.

[24] *Railroad Commission of Texas v. Rowan and Nichols Oil Co.*, ..... U. S. ....., 60 S. Ct. 1021, 84 L. ed. 983.

where the raisins are sold to local packers who hold them for a period up to two years, process or prepare them for market, and then resell to other buyers for shipment out of the state. The court cites the Minnesota Rate Cases.

The majority of the lower court quote the following from the opinion in the *Townsend* case as indicating how widely different the regulation there is from the one here [R. 41]:

> "* * * We find no ground for concluding that the state requirements lay any *actual* burden upon interstate or foreign commerce. The Georgia Act does not attempt to fix the prices at the auction sale or to regulate the activities of the purchasers. The fixing of reasonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy." (Italics supplied by the lower court.)
>
> "Here, the Georgia Act lays no constraint on purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect tobacco growers from unreasonable charges of the warehousemen for their services to the growers."
>
> "The principal purchasers of * * * tobacco grown in Georgia * * * are limited to a few large manufacturers of cigarettes."

In the present case the purchasers of the raw raisins are limited to 40 packers.

> "The tobacco is ready for the market in the latter part of July or early in August. * * * The selling season is from three to five weeks in length. The short tobacco season causes growers to rush tobacco to the market and does not give them a fair oppor-

tunity 'to properly grade, store, bundle, and orderly market their tobacco.' "

In this instance the raw raisins are matured and ready for market to the packer generally between September 15th and 30th. The selling season is from two to three months. Growers rush their raw raisins to the market because of their urgent need for ready money and they are thus deprived of the opportunity to properly grade, store, and orderly market their raw raisins.

The lower court does not point out where any *actual* burden is laid upon interstate or foreign commerce by the program under consideration and the evidence precludes the possibility that any such burden has been actually laid upon such commerce.

Speaking of the contention that local control must fall as repugnant to the exclusive power of Congress in the interstate commerce field, the court in the *Townsend* case said (U. S. Reports p. 455, S. Ct. p. 849):

> "The contention ignores the principle that this ground of invalidity is to be found only with respect to such matters as demand a general system or uniformity of regulation; that in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act. (Citing cases.)
>
> "In the instant case, the Georgia statute deals with a local need, exercising the state's protective power with respect to its own industry."

Likewise, in the present case the raisin program deals with a local need exercising the state's protective power

with respect to its own industry. No other state has a surplus of raisins to deal with. No other state has sufficient raisins to require any general system of regulation of surplus or otherwise. The problem relates peculiarly and only to California. It is the need of the growers of raisins in that state to be protected from the necessity of dumping their raw product into the hands of processors within that state at one time and without the benefit of orderly marketing.

Paraphasing the closing paragraph of the *Townsend* opinion partially quoted by the lower court we may well say:

> "Here the raisin proration program lays no restraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases or the profit of the purchasers in such commerce. It simply seeks to protect raisin producers from ruinous cut-throat conditions caused by excess seasonal surpluses. Whatever relation this regulation of seasonal surplus raisins by means of the proration program has to interstate and foreign commerce, 'the effect is merely incidental and imposes no direct burden upon that commerce. The state is entitled to afford its industry this measure of protection until its requirement is superseded by valid Federal regulation.'"

The majority of the lower court seemingly question the real motive behind the raisin proration program. They state [R. 39-40]:

> "In the light of the broad grant of power given Congress over interstate commerce and the principles laid down by the Supreme Court as herein outlined, the necessary effect upon interstate commerce of the

raisin prorate program must be scrutinized, and this with the principle in mind that one challenging the validity of a state enactment is not necessarily bound by the legislative declarations of purpose. It is open to him to show that the practical operation of the statute or of any program devised under the authority of such statute directly burdens or effectively prevents the free flow of interstate commerce. Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1, 73 L. ed. 147."

In that case the court in passing upon the "Shrimp Act" of Louisiana determined, as it subsequently stated in *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 427, 56 S. Ct. 513, 515, 80 L. ed. 772, that the ostensible purpose of such act was feigned and that the real purpose was to compel the removal of the shrimp packing and cannery industries from Mississippi to the state of Louisiana. Certainly there is nothing in the factual situation and the principles involved in that case that are even remotely comparable to the provisions and operation of the raisin proration program.

The federal government has long encouraged and urged the growers to encompass precisely the same control and with the same objectives as in the case of the program before us by means of co-operative marketing associations. And some of these, notably in citrus fruits, walnuts and even raisins have accomplished some very beneficial results and have at times controlled from 75% to 90% of the crop.

This co-operative control has had exactly the same purpose and the same effect upon interstate commerce, only in a lesser degree to the extent that the control was exercised upon 75% or 90% instead of 100% of the crop affected.

But such co-operative marketing control was never prohibited as an interference with interstate commerce.

The Supreme Court of the state has sustained the constitutionality of the statute and upheld the validity of a program encroaching much more closely upon interstate commerce than does the raisin program.[25]

The legislative branch of the federal government has placed its stamp of approval upon controlled marketing and proration as an aid to interstate commerce.[26]

Finally the executive branch of the federal government has given this particular program its approval, and through Commodity Credit Corporation has granted a loan upon the express condition that such program be placed in effect and maintained in operation.

It has remained for the majority of the lower court in this particular case to alone question this program. Their sole ground seems to be a fear that the program may be used to force consumers of raisins outside the State of California to pay an exorbitant price for the benefit of California growers, or to place a complete embargo upon their shipment out of the state.

There is not a thing in the record to support even an intimation that the program would be put to such use. The history of the raisin industry shows a continuous and strenuous effort to develop and expand the interstate market, not to restrict it. The statute itself, provides against such misuse. We are not required to deal with such a fancied situation in the present case. And finally, if and

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[25] *Agricultural Prorate Comm. v. Superior Court, supra.*

[26] *Agricultural Adjustment Act, 7* U. S. C. A. 608 *et seq.*

when, if ever, such situation arises Congress may take appropriate steps, and the courts may then forthwith enjoin such misuse of the program.

From 90 to 95 per cent of all the raisins used for human consumption are shipped out of the State of California. Not this percentage of all the raisins produced. However, the fact that the bulk or even all of a commodity ultimately moves into interstate commerce and that such commodity was produced or manufactured with that knowledge and intent does not render invalid state regulation attaching at a point prior to the commencement of its actual movement in such interstate commerce.[27]

## Plaintiff Not Qualified to Question Program.

It is perfectly true that it was open to the appellee herein to show that the operation of this Seasonal Marketing Program directly burdened or effectively prevented the free flow of interstate commerce.

Appellee has failed utterly to make any such showing. No effect whatsoever upon any price of the commodity in its movement in or subsequent to interstate commerce is shown. No depreciation or curtailment of the movement of raisins in interstate commerce is shown. On the contrary a large excess over and above any demand is shown to be ready for movement in interstate commerce at any time desired.

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[27] Bulk of Oranges, *Sligh v. Kirkwood*, 237 U. S. 52, 35 S. Ct. 501, 59 L. ed. 835; 95% of lumber (*Arkadelphia Milling Co. v. St. Louis Southwestern R. R. Co.*, 249 U. S. 134, 150-152, 30 S. Ct. 237, 63 L. ed. 517); 80% of anthracite coal (*Heisler v. Thomas Colliery Co.; supra*); 100% of tobacco (*Townsend v. Yeomans*, 301 U. S. 441, 452, 27 S. Ct. 842, 847, 81 L. ed. 1210.

It is highly questionable whether the appellee in the present instance made any showing of any interstate commerce transactions or dealings by himself sufficient to even permit him to question the validity of the program upon this ground. He relies upon four contracts for the delivery by him of 762½ tons of raisins. These contracts [Plaintiff's Exhibits 1, 3, 4, 8 and 9] were negotiated and executed in the State of California by parties within the State of California, residents therein, and all called for delivery of the raisins at terminus within the State of California. Appellee himself admitted that he did not have any understanding with these purchasers that they would ship these raisins out of the state and that he did not care whether they were shipped out of the state or not. [R. 84.]

Subsequently in an effort to supply this showing the case was reopened "for the purpose of receiving testimony regarding the character of shipments by Mr. Brown, as to whether or not these shipments were interstate." [R. 139.]

Mr. Brown then testified that all of the five contracts heretofore referred to read "subject to shipping order." [R. 139.] But an examination of the contracts themselves fails to show any such language. They all read "F. O. B. —Kerman, California."

Mr. Brown then introduced a number of written shipping instructions [Plaintiff's Exhibits 10, 11, 12, 13 and 14; R. 148, 152, 154, 157] received from the buyers under his written contracts heretofore mentioned giving him instructions relative to the delivery or shipment of the raisins covered by the contracts. These show that the bulk of such raisins were destined to be shipped out of the State of Cali-

fornia. For instance, Exhibit 10 contains instructions to ship 1200 twenty-five pound packages of raisins to the port of Stockton for the Steamship Lillian Luckenbach sailing October 24, 1940, the port of Stockton being in California.

Exhibit 11 shows a shipping instruction from Haas Brothers addressed to M. E. P. McDonnell for account of the Empire Packing Company, which is the name under which Mr. Brown did business, requesting that 115 cases be booked for shipment through the Steamship Maukai and marked Hawaiian Quartermaster Depot, Honolulu. This was dated November 23, 1940. Mr. Brown's contract with the Dried Fruit Distributors of California [Plaintiff's Exhibit 8; R. 75] shows E. P. McDonnell as the broker. The Dried Fruit Distributors got into some trouble and Mr. McDonnell asked to have this contract assigned to him. [R. 150, lines 39-42.]

As regards the shipment in interstate commerce and Mr. Brown's connection therewith we have this sequence: May 22, 1940, Brown's contract with the Dried Fruit Distributors of California for the delivery "F. O. B. Seller's Plant Kerman" of 10,000 twenty-five pound packages of raisins of the 1939 or 1940 crop at seller's option to be delivered in August, September and October of the same year. The Dried Fruit Distributors of California, who are located at Napa in that state, subsequently assigned their contract to E. P. McDonnell, a broker located at 112 Market Street, San Francisco, California, the latter in turn sells at least 115 cases of such raisins to Haas Brothers, wholesale grocers located at Third and Channel Streets, in San Francisco, and we note that all of these transactions are still intrastate within the State of California. Finally Haas Brothers makes a sale to the Army to be shipped to

the Quartermaster Depot at Honolulu. Haas Brothers then give instructions on November 23rd for these to be delivered at Pier 32 in San Francisco by December 10th for shipment to Honolulu.

These so-called shipping instructions were received by Mr. Brown in October, November and December of 1940. [R. 160.] In fulfilling these instructions which called for delivery beyond the point of Kerman, California, Mr. Brown made arrangements for such additional transportation and delivery charges and all expense thereof was paid by his contract buyer as additional charges beyond the contract price. [R. 160-63.]

Thus Mr. Brown's sole connection with interstate commerce, so far as raisins are concerned, is quite remote. Personally Mr. Brown as a packer operated exclusively *within* the State of California and purchased his raisins from growers exclusively *within* the State of California. As a packer he contracted with jobbers and wholesalers located *in* the State of California for the sale of raisins to be delivered by him *within* the State of California. At the time he made his contract he had no understanding that his buyers were going to ship such raisins out of the State and did not care whether they did or not. Some five to seven months later he received instructions from these buyers indicating that a large portion of such raisins were to go out of the State. It is quite apparent and is admitted that any such shipment out of the State resulted not from Mr. Brown's sales but from subsequent sales by the respective buyers to out-of-state purchasers. Or, as indicated in the case of Haas Brothers, Mr. Brown's buyers sold the raisins to another wholesaler *within* the State of California and this second wholesaler subsequently sold some of the

raisins for delivery out of the state. Mr. Brown admitted that the bulk of all of the raisins destined for shipment out of the State were to fill orders which his buyers had received subsequent to his sale. [R. 162-3.] In carrying out any such shipping instructions, Mr. Brown acted as the agent for such particular buyer wholly at the latter's expense and upon instructions received entirely separate and apart from his earlier contract for the sale of such raisins to the buyer.

In addition, Mr. Brown voluntarily participated in a similar program for the season of 1938-39 and applied for and received and accepted primary and secondary certificates for his raisins for that season. [R. 20, par. 16.] He participated in and accepted the benefits of the seasonal marketing program for 1938-39. Then when he sold raisins short in the spring of 1940 in the belief that no seasonal program would be put in effect for that season, he now attacks it as an unlawful interference with interstate commerce. We do not think he is in any position to invoke the equity powers of the courts to now enjoin this program.

## Unsupported Findings.

In Finding I [R. 53] the court states that plaintiff is engaged in the raisin business and that the program in question has directly interfered with such business and damaged plaintiff in excess of $3000.00. Despite objections [R. 22-4], the court refused to designate such business as either interstate or intrastate.

In Finding VI [R. 56-7] the court found that 90% to 95% of the raisins produced in said zone are consumed outside the State of California. This is true *only* as to the finished raisin product actually used for human con-

sumption. It does not take into consideration the inferior raisins used for by-products nor the annual surplus which is not sold either interstate or intrastate. This matter is definitely covered by the stipulation of facts. [R. 16, par. 9.] This was expressly called to the attention of the court [R. 25-6], but the court persisted in the erroneous finding.

In Finding VIII [R. 57] the court states that the picking and drying of the grapes in the vineyard completes the process of producing raisins and they are then ready for market as raisins and are a wholesome food. This rests purely upon the lower court's conclusion

The only evidence upon this subject in the record is that the raw raisins in that form are never sold to the trade or to the consumer and "are not fit for commercial use until they have been stemmed and cleaned." [R. 119-121.] An examination of Defendants' Exhibits "B" and "C" [R. 112-113] and the 6% [R. 112] of dirt and stems removed bear visual testimony that the raw raisin is not a commercial trade product. This was brought to the attention of the lower court [R. 27] but such finding was not corrected.

These unsupported findings are not vital in themselves, but serve to show the erroneous factual impression under which the majority of the lower court labored in reaching their legal conclusions respecting interstate commerce.

## CONCLUSION.

We believe that a surplus raisin, or orange, or grapefruit, on a surfeited market is an economically diseased article of commerce and is just as vicious a menace to interstate commerce as a physically diseased or rotten raisin orange, grapefruit or any other commodity. We think that a state may regulate all movement in the former instance as well as the latter.

However we are not now called upon to cross that bridge. We are concerned here with the control in intrastate commerce only of a raw product. Theoretically such intrastate control of the raw product may affect the interstate movement of the finished product. Actually it has not done so.

The program in question attaches antecedent to any movement in interstate commerce, does not directly regulate and does not discriminate against such commerce, does not burden or obstruct the same and treats wholly of a local problem.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that the Court should review the decision of the District Court of the United States for the Southern District of California and finally reverse it.

Respectfully submitted,

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